The Commission's grounds for banning option time in 1963 were that the practice blocked access to prime-time hours by non-network programmers, limited the licensee's choice of programming, and could "shield" programming from competition of other, more popular programs.[45] Those reasons do not apply to today's video marketplace.

The use of option time to block access by other program suppliers to the video market is not a real concern today because non-network program suppliers have access to national audiences and prime-time periods through the increased number of stations and non-broadcast outlets. Similarly, the plethora of video outlets means that an unpopular program cleared by an affiliate under an option time arrangement will not be "shielded" from competition from other programs. The result of this competition is that networks, acting in their own economic self-interest, routinely drop poorly performing and unpromising programs. The turnover in each network's prime time schedule from season to season is proof of this. Finally, if the Commission decides to adopt a modified right to reject rule as proposed in the Notice, such a rule would continue to protect the affiliate's program discretion even where it options a time period to its network.

C. Exclusive Affiliation Rule

The exclusive affiliation rule, 47 C.F.R. §73.658(a), forbids

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production of new programming. See Notice, par. 30.

[45] See Second Report and Order in Docket No. 12859, 25 RR 1651, pars. 56-57 (1963).

an agreement between a network and an affiliate limiting the station's broadcast of other networks' programs. The rule was designed to allow the opportunity for new networks to develop affiliates.[46]

In today's marketplace, the costs of the rule in foreclosing potential economic efficiencies outweigh its purported benefits. The prohibition on exclusivity inhibits competition because it precludes a type of network/affiliate arrangement that some networks and stations may find effective in differentiating themselves in an increasingly crowded video marketplace. The opportunity for exclusivity may encourage greater promotional spending by one or more of the network/affiliate combinations in a market. In addition, efficiency would be gained were the rule eliminated by reducing the "free riding" problem identified in the Notice, where an affiliate of an established network could take advantage of the audience drawn to the station by virtue of that network's popular programming to build audience for a second network's competing programs.[47]

Because of the explosion of the number of video program outlets in recent years, a ban on exclusive affiliations is not necessary to allow opportunities for new networks. With the growth in the number of independent stations, there are now enough unaffiliated stations in major markets to provide adequate affiliation opportunities for both UPN and WB. In the top-50

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[46] Notice, par. 33.

[47] Notice, par. 36.

markets, there are six or more stations in all but four markets. Even in markets 51 through 100, there are 17 markets with at least six stations and 34 with at least five.[48] As the Notice points out, to the extent there are more networks than stations in smaller markets, this gives the stations leverage to resist network exclusivity demands.[49] Moreover, the number of operating stations is not static. As the Commission has recognized, the availability of substantial new sources of programming will allow the activation of channel allotments that are now unused.[50] In addition, as discussed earlier, emerging networks can use cable and LPTV stations to supplement their broadcast coverage where they may not succeed in signing up a broadcast affiliate. In sum, because of the number of outlets for programming, even if a network and an affiliate were to bargain for exclusivity, other networks would not be shut out of the market.

If there is any residual concern that exclusivity arrangements between networks and their affiliates could be abused to foreclose emerging networks, such as in smaller markets with more limited outlets, that concern is adequately addressed by the availability

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[48] Nielsen Station Index, May 1995.

[49] See Notice, pars. 12, 37.

[50] See Fox Broadcasting Co., 5 FCC Rcd 3211, 67 RR2d 1086, par. 7 (1990) (noting that waiver of PTAR "would encourage the growth of a program service alternative to the traditional networks, and would foster the creation of new UHF stations"); accord Applicability of 47 CFR Section 73.658(g) and 47 CFR Section 73.658 (k) to Home Shopping Network, Inc., 4 FCC Rcd 2422, 66 RR2d 175, par. 25 (1989).

of antitrust law remedies. The potential for abuse in a small class of cases does not justify a general rule prohibiting exclusive affiliation.[51]

D. Dual Network Rule

The dual network rule, 47 C.F.R. §73.658(g), bans operation by one company of more than one television broadcast network serving identical or overlapping areas. It does not apply, as the Commission notes, to cable operators, direct satellite broadcasting or other multi-channel providers, and they have taken competitive advantage of the economies of scale attendant to multiple operations that are forbidden to broadcasters.[52]

On its face, the dual network rule is anticompetitive because it prevents innovation, the development of new products, and increased output -- the very goals of competition policy. The antitrust laws are thus uniformly understood to encourage the development and introduction of new products.[53] As the court put

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[51] Compare Two Year Order, par. 25 (regulatory "interference with commerce and free choice should not be maintained where, as here, there remains little justification").

[52] Notice, pars. 39, 43. The Commission notes that it is "particularly concerned that permitting merger of two or more of the existing major networks would lead to excessive concentration of market power." Notice, par. 42. Such an extraordinary merger is, in our view, not properly considered in designing a rule of general application. Such a combination would raise issues properly addressed under the antitrust laws.

[53] See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263, 282 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 443-44 (N.D. Cal. 1978) (innovations are "precisely what the antitrust laws were meant to encourage") aff'd per curium sub nom. Memorex Corp. v.

it in the landmark Berkey case, "any firm, even a monopolist, may bring its products to market whenever and however it chooses." 603 F. 2d at 286. The dual network rule flies in the face of this policy.

Elimination of the rule would promote the efficiency goals of competition policy by permitting network companies to take advantage of scale and scope economies to produce additional programming for over-the-air television. The network companies have at their disposal unique program and promotional expertise and the resources to expand their activities. In the news area, in particular, ABC, CBS and NBC each has a worldwide newsgathering and production capacity that could readily support additional program services. As the Commission notes in the Notice, the network companies affected by the rule have instead been forced to channel their resources into non-broadcast media, such as cable program networks.[54] Thus, the dual network rule skews the video marketplace by allowing opportunities for additional program services in cable -- for example, news services such as CNBC -- while foreclosing additional free over-the-air broadcast services. The result is that networks are permitted to develop additional programming services for distributors who charge a fee for their services, but

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IBM, 636 F. 2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 1972 (1981); In re IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 1003 (N.D. Cal. 1979) ("Truly new and innovative products are to be encouraged, and are an important part of the competitive process."), aff'd sub nom. Transamerica Computer Co. v. IBM, 698 F. 2d 1377 (9th Cir.), cert. denied, 464 U.S. 955 (1983).

[54] Notice, par. 39.

are precluded from developing comparable programming for free distribution to the public.

Like the network-affiliate rules discussed above, the dual network rule was designed 50 years ago to bolster competition by encouraging the growth of new networks, and to advance diversity by preventing undue concentration of power in the networks.[55] But just as in the case with the affiliation rules, the dual network restraint can no longer be justified on those grounds. There is simply no remaining basis for continuing to deprive the public of the efficiency benefits the rule precludes.[56]

There is no longer any basis for concern -- if there ever was -- that dual networking would lead to network market power in some relevant market. The networks compete in three economic markets -- the video program production market, in which they compete for programming with other purchasers; the national video program distribution market, in which they compete with each other, with new networks, and with syndicators, cable program services and DBS and video dialtone operators; and the national advertising market, in which they compete for advertising dollars with other sellers of advertising time and space.[57]

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[55] Notice of Proposed Rule Making, MM Docket No. 88-396 (released September 23, 1988), pars. 7, 16; Report, Statement of Policy and Order, Docket No. 20721, 63 FCC 2d 674, 40 RR 2d 80, par. 25 (1977); Notice, par. 38.

[56] See Notice, par. 39 (noting that Commission notice in 1993 proposed repeal of the rule).

[57] See Multiple Ownership Notice, par. 22. The networks also compete in the market for affiliates. In Section I.A. above, we demonstrate that the networks do not have market power in the

The Commission has recently concluded that the networks do not have market power in the video production and distribution markets. In eliminating the fin/syn rules, the Commission observed that "any structural advantages of the established networks are no longer sufficient to allow them to dominate the program production and distribution markets."[58] As we demonstrated in our analysis of the video production market which we submitted with our Ownership comments, concentration levels are so low that there is no basis for believing that elimination of the dual network rule would lead to the attainment of market power.[59]

The Commission's fin/syn findings were underscored in PTAR which focussed more specifically on the video distribution market The Commission emphasized the substantial increase in broadcast video distribution outlets.[60] It then concluded that, even considering only broadcast television stations and their networks, no local affiliated station, single network or combination of networks has the ability to dominate program distribution in the

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competition for affiliated stations.

[58] Fin/Syn Expiration Order, par. 26.

[59] In its Multiple Ownership Notice, the Commission proposes a definition of the video production marketplace which would include broadcast television networks and syndicators, cable networks, cable operators, DBS and other satellite services, low power television stations and telephone companies. Using the Commission's definition, our Analysis demonstrates that concentration among firms buying national rights to video programming is very low; the "HHI" is under 800. Multiple Ownership Notice, pars. 48-49; Ownership Economic Analysis at 42-43, Appendix G, Table G-7.

[60] PTAR Report and Order, par. 27.

top 50 markets.[61] The Commission noted that its conclusion would apply with even greater force if the market was more broadly defined to include cable operators and others. As the Commission said, "inclusion of additional television alternatives such as cable, satellite systems, video dialtone, etc. would serve to make domination by the networks and their affiliates even less likely."[62] The Commission noted that broadening the definition to include cable operators would be reasonable because cable operators are likely "relevant alternative distributors of video programming."[63]

With respect to the national advertising market, the Commission has proposed an analytical framework for evaluating competition in that market in the context of its pending ownership proceeding. The Commission tentatively proposed in that proceeding to include in its market analysis only video media, and only advertising supplied by broadcast networks, program syndicators and cable networks.[64] Although in our view the Commission's proposed national video advertising market is too narrow, even in that market, the number and market shares of the video media competitors

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[61] PTAR Report and Order, pars. 26, 29-31. The top 50 markets represent 66.541% of US TV households. Nielsen Station Index, US Television Household Estimates September 1995

[62] PTAR Report and Order, par. 31.

[63] PTAR Report and Order, par. 26.

[64] The Commission's market definition excludes all non-video advertising such as national radio and national print advertising, and within the video industry, all DBS advertising and all national spot advertising carried by broadcast television stations and cable systems (except "perhaps" MSOs). Multiple Ownership Notice, par. 37.

insure that no firm has market power; and, as we have elsewhere explained, it would be very difficult for the sellers of national broadcast advertising time to reach, monitor or enforce any collusive agreement.[65] If the market is defined more broadly, as we believe is clearly appropriate, to include broadcast national spot and cable national spot, it becomes even more clear that there is no likelihood of market power.[66] There is little reason to think that the addition of a new network, in addition to the multitude of national advertising vehicles that now exist, will create market power or any kind of competitive problem in the national advertising market.

There is, in short, no reason to fear that elimination of the dual network rule will enable any existing network to achieve market power in program production, national video program distribution or national advertising. Absent market power, the mere offering of a second network cannot impair competition and would, instead, increase the alternatives available to program producers, local stations, advertisers and viewers.

Competitive concerns could arise only if the dual network operator occupied an undue portion of available local outlets thereby retarding the access of other broadcast networks or program

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65 See Ownership Economic Analysis at 28, 34-36.

66 Id. at 28-29. There is also strong evidence based on the substitutability of these additional advertising vehicles for national advertisers, that the market should be defined even more broadly to include radio network, radio spot, newspaper, magazine, yellow pages, outdoor and direct mail advertising. Id. at 18-23 and Appendix D.

suppliers to viewers.[67] The focus of the competition analysis should thus be, not on the product offerings of the network operators or how many networks they own, but on the distribution of video programming in individual, local communities.

Here, too, there is little reason for concern because of the substantial growth in full-power broadcast stations available for affiliation, the potential increase in the number of stations as the result of activation of currently unused channel allotments, the pervasiveness of cable as a local outlet, and the increase in the number of low-power stations.

Competitive concerns are thus very unlikely. Such concerns could arise only in particular local markets where existing and potential station (and other local distribution) facilities are inadequate to accommodate otherwise viable broadcast networks and program suppliers. Even these competitive concerns are unlikely, however, because it is those markets in which local distributors are most powerful that it is least likely that a network could exercise market power.

In short, whatever competitive risks might remain, if any, are unlikely and speculative and would necessarily be limited to individual, local circumstances. Such risks depend, not on the mere offering of additional programs or additional networks, but on particular distribution arrangements that a network operator might obtain. It is wholly inappropriate to respond to such risks by imposing an overprotective, anticompetitive ban on all dual

[67] Notice, par. 38.

networking in all markets, whatever its scope and whatever the particular arrangements between the dual network operator and its affiliates. In light of the speculative, fact-specific and market-specific nature of any competitive concerns, this is again an issue that is best left to the case-by-case application of the antitrust laws.

The Commission specifically asks for comment on the effects of technological advances and how the possible use of multiple channels would implicate the dual network rule.[68] The Commission has already recognized the need to accommodate new technology by deciding in 1992 to suspend the rule temporarily during the ATV transition period to permit networks to give their affiliates a second feed for ATV.[69] In our view, the Commission's 1992 decision was correct and should be reaffirmed. To the extent that a network decides to use the ATV feed to simulcast its NTSC programming -- which we believe should be the central purpose of the ATV channel during the transition period -- suspension of the dual network rule remains necessary to achieve that purpose. What has changed since 1992 is that technological developments now hold out the possibility that, if permitted to do so under the Commission's ATV transition rules, some stations may choose to engage in

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[68] Notice, par. 41.

[69] See Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 6924, 71 RR2d 375, pars. 14-15 (1992). Where a network's NTSC affiliate fails to apply for or construct an ATV facility within the required time frame, the Commission's decision to suspend the dual network rule would permit the network to affiliate with a different licensee in the market. Id. at par. 14.

multicasting on the ATV channel at least for part of the broadcast day. Under that scenario, it also makes sense for the Commission to suspend the dual network rule for the purpose of multicasting. There is simply no basis to exclude networks as a potential source of programming to meet station programming needs during the ATV transition period. Therefore, the Commission should reaffirm its decision to suspend the dual network rule for ATV and make it clear that the suspension allows a network to provide stations multiple program services on the ATV channel in addition to continuing to feed its NTSC affiliates NTSC programming for the NTSC channel.

The Commission's attention to the question of how the dual network rule would impact on ATV is commendable. It shows that in reevaluating its regulations the Commission is focussed properly on the effects of its actions on the marketplace of the future. One feature of that marketplace that can be predicted with reasonable certainty is that over-the-air broadcasters will be competing against ever more numerous non-broadcast program outlets. In that environment, there is every reason to encourage the over-the-air networks to expend even greater efforts to enhance both the quantity and quality of free over-the-air services. Indeed, allowing dual network operation would likely promote diversity as networks design new program services to appeal both to mass audiences and to narrower consumer segments.

E. Network Territorial Exclusivity Rule

The territorial exclusivity rule, 47 C.F.R. §73.658(b), prohibits network/affiliate agreements preventing (a) delivery of a network program not cleared by a primary affiliate to another station in same community of license, and (b) delivery of network programs to another station in a different community of license.[70] The Commission proposes eliminating the first prong of the rule and retaining the second in modified form.[71]

To the extent that the rule is designed to protect the networks from excessive demands for exclusivity by affiliates, it is unnecessary. Networks do not require the assistance of regulation to protect against concessions to affiliates that would harm the public interest. Networks have a primary interest in the broadest possible circulation. In pursuing their own business interests, networks can be reliably expected to avoid unreasonable exclusivity demands by affiliates that would restrict their circulation.

Moreover, in view of the expansion in program supply, there is no longer a need for a government policy which singles out networks for distribution conditions or restrictions that are imposed on no other entities. Exclusivity is a normal term of contract in the negotiation of distribution arrangements between suppliers and exhibitors.[72] To the extent that such arrangements would unreasonably block access to program product, antitrust law remedies are available to the aggrieved parties. There is

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[70] Notice, par. 44.

[71] Notice, par. 50.

[72] See Notice, par. 47.

accordingly no strong public interest served by the rule. We believe, as the Commission stated in eliminating the two-year rule, that it is preferable to allow the parties the freedom to structure the most efficient arrangement in light of competitive necessities.[73]

Should the Commission decide to retain the second prong of the rule in modified form, we would urge that it extend the permitted geographic exclusivity area to the affiliate's DMA. The DMA is the best available approximation of the area in which a station actually competes with its direct broadcast competitors for viewers, advertising and programming.[74] It is a reasonable and normal business practice for a distributor to enjoy product exclusivity within its geographic market. Exclusivity can also produce efficiency gains by encouraging greater investment in promoting the exclusive network product.

III. Cumulative Effects

The "right to reject" rule modified as proposed in the Notice is all that is necessary to protect affiliate programming freedom and allow opportunities for new networks. While it is possible to speculate that elimination of the remaining rules could in some extreme cases, in particular local markets, lead to anticompetitive results, reliance on current antitrust enforcement standards is

[73] Two-Year Order, par. 22.

[74] Comments of Capital Cities/ABC, Inc. (filed May 16, 1995) in MM Docket Nos. 91-221 and 87-8 at 21-23; Ownership Economic Analysis at 13-17, 29-37, 44-47, 87-92, Appendices B and D.

adequate to protect the public. This is a far better course than retaining rules which prevent not only competitively neutral activity but also activity that would yield competitive benefits through greater efficiencies. Since competitive conditions vary widely across markets, the case-by-case analysis of local competitive conditions that is performed in an antitrust analysis is better suited to deal with potential competitive abuses than an unnecessarily restrictive rule or set of rules.

Conclusion

For the reasons stated above, Capital Cities/ABC urges that the Commission (a) modify the right to reject rule to provide that it may not be invoked by an affiliated station based solely on financial considerations; (b) revise the time option rule to allow affiliation agreements under which networks may have an option to program specified time periods of an affiliate's schedule, subject to a minimum notice period; (c) repeal the exclusive affiliation and dual network rules; and (d) repeal the network territorial exclusivity rule, or, in the alternative, modify the rule to extend the permitted exclusivity area to the DMA.

Respectfully submitted,

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